



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 12, 1997

The Honorable Dickie Geris  
Chair  
Texas Agricultural Finance Authority  
P.O. Box 12847  
Austin, Texas 78711

Letter Opinion No. 97-052

Re: Whether common-law conflict of interest rules prohibit a bank that employs a Texas Agricultural Finance Authority board member from participating in the linked deposit program (ID# 39160)

Dear Mr. Geris:

On behalf of the Texas Agricultural Finance Authority ("TAFA" or "the authority")<sup>1</sup> you ask whether a bank that employs a TAFA board member may participate in the linked deposit program established under sections 44.007 through 44.010 of the Agriculture Code. You are concerned about the application of common-law conflict of interest rules in this situation.

The statutes and regulations give the state treasurer various responsibilities for the linked deposit program, but the treasurer's duties have been transferred to the comptroller since the adoption of these provisions.<sup>2</sup> Accordingly, we will substitute "comptroller" for "treasurer" in discussing these provisions.

The linked deposit program is designed "to encourage commercial lending for the enhanced production, processing, and marketing of certain agricultural crops and for the purchase of water conservation equipment for agricultural production purposes."<sup>3</sup> The state places a "linked deposit" in a lending institution that must agree to lend the value of the deposit to an eligible borrower at a statutorily-capped interest rate.<sup>4</sup> You state that the deposit essentially serves the same purpose as having the state open a savings account in the lending institution involved. The state thus provides the lending institution with on-hand capital, allowing the lender to offer the borrower a lower interest rate on an agriculture-related loan. The state is, however, not liable to a lending institution for payment of principal, interest, or any late charges on such loans.

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<sup>1</sup>The Texas Agricultural Finance Authority is created within the Department of Agriculture to provide financial assistance for economic activities relevant to Texas agricultural products. Agric. Code § 58.011.

<sup>2</sup>Gov't Code § 404.0011.

<sup>3</sup>Agric. Code § 44.007(a).

<sup>4</sup>*Id.* § 44.001(5).

To participate in the program, a lending institution must be an approved state depository.<sup>5</sup> A potential borrower applies to the lending institution for a loan, and after reviewing the application and determining that the applicant is eligible and creditworthy, the lending institution sends the application for the linked deposit loan to TAFE.<sup>6</sup> The TAFE board reviews each linked deposit loan application and recommends to the comptroller the acceptance or rejection of the application.<sup>7</sup> After acceptance of the application, and after the lending institution and the comptroller enter into a written deposit agreement containing the conditions on which the linked deposit is made, the comptroller places a linked deposit with the lending institution for the period the comptroller considers appropriate, subject to limitations established by statute.<sup>8</sup>

The rules for the linked deposit program issued by TAFE amplify the board's role in approving applications for linked deposits. The TAFE board "shall promulgate rules for the loan portion of the linked deposit program."<sup>9</sup> Pursuant to this authority, TAFE has adopted rules "regarding the administration, implementation, practice, and procedure" of the linked deposit program.<sup>10</sup> The TAFE's rules on acceptance and rejection procedures for applications provide in part:

(b) If the . . . [comptroller] disagrees with the Authority's recommendation, the . . . [comptroller] and the Authority shall meet to resolve the disagreement.

(c) Unless . . . [the comptroller] disagrees with the Authority, upon receipt of the completed application, 105% collateralization of the linked deposit by the lender, and written notice of funding of the loan from the Authority, the . . . [comptroller] will wire the linked deposit to the lender in immediately available funds the same day. . . . The . . . [comptroller] will then provide the Authority confirmation of the linked deposit.

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<sup>5</sup>Authority to approve a bank as a state depository is vested in the State Depository Board. Gov't Code § 404.021.

<sup>6</sup>Agric. Code § 44.007(d).

<sup>7</sup>*Id.* § 44.007(f).

<sup>8</sup>*Id.* § 44.007(g), (h).

<sup>9</sup>*Id.* § 44.007(b). In addition, TAFE "may adopt rules that create a procedure for determining priorities for loans granted under this chapter," including preferences to achieve adequate geographic distribution of loans, assist certain industries, encourage certain practices including water conservation, and encourage value-added processing of agricultural products. *Id.* § 44.007(j).

<sup>10</sup>4 T.A.C. § 26.2.

(e) An applicant or a lender may request a hearing on the rejection of an application. The hearing will be conducted by the Authority in accordance with the contested case provisions of rules of practice and procedure of the Authority.<sup>11</sup>

Finally, "[a]ll communications about the [linked deposit] program should be directed to the Texas Agricultural Finance Authority."<sup>12</sup>

A prior ruling of this office describes the common-law conflict of interest rules applicable to state agencies such as TAFE:

The governing boards of state level institutions . . . are subject to the strict common-law rule regarding conflict of interest that bars a governmental body from entering into a contract in which one of its members is pecuniarily interested. Attorney General Opinions JM-817 (1987) at 2, JM-671 at 2; Letter Opinion 92-52 (1992) at 3; see *Meyers v. Walker*, 276 S.W. 305, 307 (Tex. Civ. App.—Eastland 1925, no writ). This office has held even very small pecuniary interests to constitute a prohibited financial interest in a public contract. See Attorney General Opinions JM-817 at 2, JM-671 at 3; JM-424 (1986) at 4; H-624 (1975) at 2. Furthermore, the strict common-law rule reaches the indirect as well as the direct pecuniary interests that a member of a governmental body may have in a transaction. See *Bexar County v. Wentworth*, 378 S.W.2d 126, 128-29 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.); Attorney General Opinions JM-817 at 2; JM-671 at 3. Contracts violating this strict common-law rule are void. *Bexar County*, 378 S.W.2d at 128; *Meyers*, 276 S.W. at 307; Attorney General Opinions JM-671 at 2-3; JM-424 at 5; H-624 at 2.<sup>13</sup>

Recusal of the interested board member will not make the contract valid.<sup>14</sup>

The public contract at issue is the written deposit agreement between the lending institution and the comptroller, pursuant to which the linked deposit is placed in the lending institution. The parties to the contract are the lending institution and the comptroller, not TAFE. However, the TAFE board recommends to the comptroller the acceptance or rejection of the lending institution's application for a linked deposit loan. If the comptroller agrees with TAFE's recommendation, the application goes through and the TAFE recommendation in effect becomes the final decision to enter into the linked

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<sup>11</sup>4 T.A.C. § 26.8.

<sup>12</sup>4 T.A.C. § 26.12.

<sup>13</sup>Letter Opinion No. 93-12 (1993).

<sup>14</sup>*Delta Elec. Const. Co., Inc. v. City of San Antonio*, 437 S.W.2d 602, 608-09 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.); Attorney General Opinion JM-424 (1986) at 5.

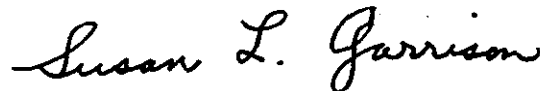
deposit contract. If the comptroller disagrees with TAFE's recommendation, the TAFE board meets with the comptroller to resolve the disagreement. Thus, the comptroller's disagreement with TAFE's recommendation does not end the matter, because the TAFE board has an opportunity to persuade the comptroller to agree. Because TAFE participates so fully in the process of entering into a linked deposit contract, we believe the common-law conflict of interest rules prevent a TAFE board member from having a direct or indirect pecuniary interest in such contracts.

This office has determined that an employee of a firm has a pecuniary interest in the contracts it enters into, because an employee has an interest in the welfare of the company that would tend to affect his or her judgment.<sup>15</sup> Accordingly, a TAFE board member employed by a bank would have a pecuniary interest in its linked deposit contracts such that common-law conflict of interest rules would invalidate linked deposit contracts with that bank.

### S U M M A R Y

A member of the Texas Agricultural Finance Authority employed by a bank would have a pecuniary interest in the bank's linked deposit contracts entered into under sections 44.007 through 44.010 of the Agriculture Code such that common-law conflict of interest rules would invalidate the contracts. Accordingly, a bank that employs a board member of the authority may not participate in the linked deposit program.

Yours very truly,



Susan L. Garrison  
Assistant Attorney General  
Opinion Committee

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<sup>15</sup>Attorney General Opinion H-916 (1976) at 2 (quoting *Edward E. Gillen Co. v. City of Milwaukee*, 183 N.W. 679 (Wis. Sup. 1921)). See also Attorney General Opinion JM-884 (1988) at 2.